U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 May 2004

CASE NUMBER: 2002-LHC-2609

OWCP NO.: 06-185152

IN THE MATTER OF

CHESTER FULLER,
Claimant

v.

EASTERN SHIPBUILDING GROUP,
Employer

and

AMERICAN LONGSHORE MUTUALASSOCIATION,
Carrier

APPEARANCES:

David C. Barnett, Esq.
On behalf of Claimant

Lawrance B. Craig, III, Esq.
Frank J. Sioli, Esq.
Michael Kelley, Esq.
On behalf of Employer/Carrier

BEFORE: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.* brought by Chester Fuller (Claimant) against Eastern Shipbuilding Group (Employer) and American Longshore Mutual Association

(Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on February 2, 2004, in Pensacola, Florida.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs in support of their respective positions. Claimant and his wife, Vicky Fuller, testified live and introduced three exhibits: a deposition of Jerry Adato, vocational rehabilitation counselor (CX-63); a deposition of Dr. Kenneth A. Finch, Ph.D., licensed mental health counselor (CX-64); a deposition of Dr. John T. Renick, psychiatrist (CX-65); and a State of Florida unemployment form on Claimant filled out by Employer dated September 6, 2002 (UCB form 12, CX-68). Employer called three live witnesses: Dr. Bruce Witkind, neurosurgeon; Jerry George Albert, vocational rehabilitation counselor; Mark McGruder, human resources manager for Employer. Employer introduced the following eleven exhibits: medical records and deposition of Dr. Pankaj P. Chokhawala (EX-9, EX-56, EX-57, EX-61); records of Jerry Albert (EX-24); updated deposition of Chester Fuller (EX-53); medical records of Dr. Bruce Witkind (EX-58); records of Jerry Albert ((EX-60); Claimant's earnings record (EX-62); curriculum vitae of Dr. Witkind and Jerry Albert (EX-66. EX-67).[1]

In addition, the parties introduced the following twenty eight joint exhibits: depositions of Chester Fuller (including a hand-written statement and average weekly wage records); William Scheffler, Vicky Sue Fuller, and Drs. Michael Reed, John Durfey and Thomas Derbes (JX-1 through JX-6 and JX-23, JX-25, JX-51, JX-52, JX- 54, JX-55); records of Bay Message Therapy, Bay Walk in Clinic, Dr. Kamal Elzawahry (JX-7. JX-8, JX-10); records of Dr. Kenneth Finch; Thomas Merrill, John T. Renick, Michael Rohan, Healthsouth Emerald Coast Rehabilitation Hospital, Ergo Science, Gulf Coast Medical Center, Magnolia Medical Clinic, Panama City Open MRI, and Therapy One. (JX-11 through 22).

The parties filed post hearing briefs. Claimant's brief consisted of 16 pages with few references to the record. Employer's brief on the other hand was 72 pages in length with multiple references to record evidence. Based upon the parties' stipulations, the evidence introduced, my observation of witness demeanor, and the arguments presented, I make the following findings of fact, conclusions of law and order.

[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__: Claimant's exhibits (CX-__, p.__); Employer exhibits (EX-__, p.__); Joint exhibits (JX-__, p.__).

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on March 30, 2001.

2. The injury occurred during the course and scope of Claimant's employment with Employer.

3. An employer/employee relationship existed at the time of the injury.

4. Employer was advised of the injury on March 30, 2001.

5. Employer filed a Notice of Controversion on July 24, 2001

6. Claimant's average weekly wage at the time of injury was $987.63.

7. Employer paid the following compensation and medical benefits:

Temporary total disability of $15,332.48 from March 31, 2001 to September 9, 2001; $2,728.18 on November 4, 2002; $2,821.93 from February 19, 2003 to March 20, 2003;

Temporary partial disability of $94.06 from September 10, 2001 to October 21, 2001;

Medical benefits of $20,976.66.

II. ISSUES

The parties presented the following unresolved issues:

1. Nature and extent of injuries.

2. Whether Claimant is entitled to any additional temporary total or

temporary partial disability awards.

3. Whether Claimant is entitled to any additional permanent total or permanent partial disability awards.

4. Date of maximum medical improvement

5. Whether Claimant sustained a loss of wage earning capacity.

6. Interest, costs, and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology

Claimant is a 45-year old male; he is married and lives in Chipley, Florida. Claimant has a 10th grade formal education with a long and impressive work history prior to and including his employment with Employer. Before being employed by Employer, Claimant worked as a grocery store clerk, dishwasher, restaurant night shift manager and cabinet maker. Employer hired Claimant in 1984 and assigned him to work initially as a tacker at $6.00 per hour. Claimant did this work for about 6 weeks and left to return to cabinet making. Claimant worked as a cabinet maker for about 6 to 8 months, after which Employer rehired Claimant as a second class carpenter at $7.75 per hour and assigned him to the woodworking department building new and repairing old ships. (Tr. 23-28; JX-1, pp. 6-15).

Employer promoted Claimant to a first class carpenter at $8.50 per hour and assigned him to a variety of tasks from hanging doors and cabinets to building cabinets, installing trim, staining and varnishing. As a first class carpenter, Claimant used a variety of tools in skill saws, jig saws, routers, hammers, table and arm saws. Due to lack of work Employer laid off and recalled Claimant on three occasions. During one of those lay-offs in 1992-1993, Employer's owner hired Claimant to work at the Passport Marina it purchased, paying Claimant $10.00 to $12.50 per hour. (JX-1, pp.16-18). In 1995, Employer recalled Claimant and promoted him to carpenter foreman at $19.00 per hour working between 55 to 60 hours, 6 to 7 days per week. As carpenter foreman, Claimant spent about 70% of his time at the trade with the remaining 30% devoted to paper work. (Tr.30-32; JX-1, pp. 19, 20). Claimant reported to Rick Mills, carpenter superintendent, who in turn reported to Benny Bramblett, yard superintendent. (JX-1, pp. 21).

On the morning of March 30, 2001, Mills instructed Claimant to take his crew and begin a ship launching operation by removing a curtain, seawall and filter cloth that had been buried in 8 to 10 inches of dirt. As Claimant pulled up on the filter cloth he felt a sharp pain in his lower back and right leg. Claimant reported the incident to Mills and safety man Mack Woods, telling them he thought he pulled a muscle and would try to walk if off. Claimant continued to work that day despite increasing pain. (Tr. 33-36; JX-1, pp. 26, 27). Claimant requested and received authorization from Woods for medical treatment. The following day, Claimant went to the Bay Walk-In Clinic where he was prescribed Lortab, Flexeril, Vioxx and Oxycontin, and was referred to Dr. Rohan who ordered an MRI showing a right lateral disc herniation at L4-5. (Tr. 37-39; JX-21).

Claimant sought out the services of orthopedist Dr. Michael Reed, who initially saw Claimant on April 11, 2001. He assessed lumbar disc disease with radiculopathy based on a lumbar MRI showing degenerative disc disease at L4-5 and L5-S1, an extruded disc fragment at L4-5 with inferior extrusion towards the L5-S1 disc space, and moderate to severe symptoms in the right leg. (JX-4, pp. 105-107). Dr. Reed prescribed Flexeril and Percocet. (JX-4, pp. 3-4). On April 24, 2001, Dr. Reed performed a microscopic lumbar laminotomy/diskectomy at L4-5. (Tr. 40; JX-4, pp. 71-73). On September 27, 2001, physical therapist James B. Cox, on instructions from Dr. Reed, administered a functional capacity assessment of Claimant, finding him capable of sustaining medium level of work. (JX-4, pp. 78).

Although Claimant continued to complain of leg and back pain, Dr. Reed told Claimant that there was nothing he could do further for him and that he should return to work. (Tr. 44). Claimant returned to work whereupon Mills assigned him to do finish up work on a tug boat. The job required Claimant to climb over a seawall and ship gunnels, which Claimant was unable to do. (Tr. 45-50). Thereafter, Claimant was apparently assigned to less strenuous work in a carpentry shop but had difficulty doing this and was released by Employer in July, 2002, because of an inability to do this work, even with the assistance of two to three carpenters.

B. Claimant's Testimony

Claimant's testimony centered around his past work, the March 30, 2001 accident, subsequent medical care by Drs. Reed, Derbes, Durfey, Renick and

Finch, post-surgery complaints, and his unsuccessful attempt to find work. After describing his past work and assignments by Employer, including the March 30, 2001 accident, Claimant testified he initially sought treatment for low back and right leg pain at the emergency room of Gulf Coast Medical Center on March 31, 2001. (JX-1, pp. 28-29). There, Claimant received conservative care consisting of various medications, including Oxycontin, and had a lumbar CT scan which revealed an L4-5 right paracentral disc herniation with degenerative facet changes throughout the lumbar spine. (JX-14, pp. 71-86). From there Claimant was referred to Bay Clinic where he received additional medication and was sent to orthopedist Dr. Reed for further evaluation. Dr. Reed performed back surgery on April 24, 2001 followed by about 12 weeks of aquatic therapy which failed to relieve back pain, post surgery headaches, right leg numbness from knee to toe, and limited range of neck motion. Nonetheless, following an FCE, Dr. Reed told Claimant to return to work, which he did on September 10, 2001. Dr. Reed also told Claimant he could do nothing further for him and placed him at maximum medical improvement on September 17, 2001. (Tr. 39- 44; JX-1, pp. 32-39).

Upon returning to work, Mills assigned Claimant to work on a tugboat. Claimant was unable to do the necessary climbing over seawalls and ship gunnels whereupon Mills assigned Claimant to work in Employer's carpentry shop. Claimant had difficulty walking from the parking lot to the carpentry shop, a distance of 1.8 miles over uneven surfaces. (Tr. 45-46). Claimant also had difficulty performing less strenuous carpentry shop duties, which required him to stand on concrete floors for 8 hours a day, with little opportunity to sit down. Claimant testified he experienced difficulties performing his job, and even missed one day of work because of his back pain. In July, 2002, Mills called Claimant into his office following a safety meeting. Employer's human resources manager, Mark McGruder, was also present. Both McGruder and Mills told Claimant they were going to place him back on workmen's compensation due to his inability to perform his job due to his work restrictions. Employer, however, failed to reinstate the workmen's compensation except for a one month period. (Tr. 47-49). Claimant testified he attempted on several occasions to call Woods about Employer's failure to reinstate workmen's compensation, but Woods never returned his calls and never offered alternative jobs. (Tr. 54-56). Claimant testified he met with Employer's vocational expert, Jerry Albert, on one occasion for 30-45 minutes, during which time Claimant described his work background and Albert stated he was going to try to find Claimant work. In turn, Albert provided Claimant with several job leads which proved unsuccessful when Claimant informed the prospective employers of his work limitations. (Tr. 57-59).

Following his initial orthopedic treatment, Dr. Reed referred Claimant to neurologist Dr. Thomas Derbes for pain management. After 3 to 4 sessions, Dr. Derbes referred Claimant to anesthesia and pain management specialist Dr. John D. Durfey, who prescribed medication, massage and water therapy and enlisted the services of psychiatrist Dr. John T. Renick and licensed mental health counselor Dr. Kenneth A. Finch. (Tr. 50-54). In addition to these doctors, Claimant testified he underwent a 20-minute examination by neurosurgeon Dr. Bruce Witkind about 1 ½ weeks before the hearing. (Tr. 61, 62).

At his deposition taken January 16, 2004, Claimant testified he suffered depression and anxiety caused by his injury, subsequent pain and the way Employer/Carrier handled his claim. Specifically, he testified he could not sleep, had no appetite and did not get along well with his family or friends. Claimant testified his sessions with Dr. Finch helped his condition. (EX-53, pp. 11, 19). Although he admitted at hearing that Dr. Derbes cautioned him against taking narcotic medication, Claimant testified his dosage of Oxycontin was not increased, and he was not addicted to the medication. Rather, the medication made him weak and dizzy, but while Claimant looked forward to not taking Oxycontin, he testified it was the only thing that would help control his pain. (Tr. 101-02; EX-53, p. 18).

On cross-examination, Claimant described in detail his past carpentry work for Employer. (Tr. 67-78). Claimant also described his continuing problems with low back pain radiating into his right leg, which became worse following the surgery, and his additional problems with headaches, limitation of neck motion, shoulder and arm pain, and hand swelling. (Tr. 78-82). Claimant admitted to being unable to work about 75% of the time following his return to work on September 10, 2001. Claimant disagreed with the results of the September 27, 2001 FCE, which lasted only an hour, stating he cannot sit 3 to 6 hours out of an 8 hour day, stand on a frequent basis of 3 to 6 hours out of an 8 hour day, or walk for a similar period of time. Claimant testified that he has a hard time balancing, especially on uneven surfaces. (Tr. 86-92). At his deposition, Claimant testified he felt he was unable of performing any job; however, he wanted to return to work and expressed willingness to meet with a vocational counselor to find a suitable job. Since his termination at Employer in July, 2002, Claimant has received only $2800 in disability compensation. He is also receiving financial assistance from family, although their funds were limited. Claimant testified he was denied social security disability, but has reapplied and is awaiting a determination. (EX-53, pp. 20-23, 26, 28).

At the hearing, Claimant also admitted that: (1) Dr. Durfey prescribed massage and aqua therapy that helped relieve pain, but only for a limited period of time; (2) he conducted job interviews by phone, has been under considerable financial stress, can drive about 25 to 30 miles, or 30 minutes, at a time, and can walk in stores on occasion. (Tr. 101-04).

C. Claimant Wife's Testimony

Claimant's wife, Vicky Fuller, who has been married to Claimant for almost 23 years, testified that the day following the accident Claimant attempted to go to work but had to pull off to the side of the road whereupon she drove him to the hospital. (Tr. 113). Thereafter, she monitored his medical care and drove him to all his doctor appointments. Ms. Fuller testified that following the surgery Claimant's condition deteriorated and he complained of headaches. When Ms. Fuller questioned Dr. Reed about the cause of the headaches, Dr. Reed became very defensive, stating the surgery had nothing to do with it. (Tr. 114-16).

Ms. Fuller testified the surgery was successful in restoring circulation to Claimant's right leg and minimizing the right leg radiating pain. (Tr. 117-18). However, following the surgery, Claimant had to give up his hobby of breeding boxers and dishing, experienced poor sleeping and an inability to get along with family members. (Tr. 121). At her deposition, Ms. Fuller testified Claimant could not cope with his anxiety, and she observed a daily decline in his strength and sadness. As a result of the accident, Claimant suffered financially, exhausting almost all family resources; they do not receive welfare or any other public assistance. (EX-54, pp. 5-6, 9).

Ms. Fuller testified she has assisted Claimant in his job search by reviewing job leads provided by Jerry Albert and listening in on an extension phone as Claimant underwent job interviews; he was turned down when he mentioned his job limitations which prevented him from prolonged standing, sitting, and heavy lifting. (Tr. 124, 125, 132, 133). On cross, Ms. Fuller testified Claimant worked following surgery, but in a limited capacity of stenciling life jackets, building boxes for boats, and setting up machinery for less experienced carpenters. (Tr. 128-29). Further, Dr. Reed told Claimant he could not do anything more for him and was not his doctor any longer, but referred him to Dr. Derbes for pain management. However, Dr. Derbes initially told Claimant and his wife that he was

not going to prescribe drugs. (Tr. 130). Ms. Fuller testified Claimant did not like to take medication because he viewed it as a sign of weakness; however, he was unable to function without the Oxycontin. (EX-54, p. 13).

D. Testimony of Mark McGruder

McGruder has been the Employer's human resources manager for the past 7 years. He testified Claimant supervised a crew of marine carpenters; as foreman he was employed for his knowledge and experience. McGruder testified Claimant returned as a carpenter foreman after his injury, earning the regular rate of $19 per hour. Although Claimant can give orders verbally, McGruder testified he wanted the foreman to be able to demonstrate tasks. Claimant was not expected to do manual labor upon his return to work; nonetheless, he did not do his job when he came back, causing problems for Employer. Additionally, McGruder testified Claimant did not earn overtime hours after his injury. McGruder stated Claimant was terminated because he had a work injury covered by the Act. Claimant was not given any warnings of his termination. This is consistent with the Termination Notice of Unemployment Compensation Claim Filing in which McGruder indicated Employer placed Claimant on a leave of absence, without guaranteeing his job would be available at the end of the leave, on July 23, 2002. The form, which was signed by McGruder on September 6, 2002, indicated Claimant was "off work due to a work injury covered by the US Longshore and Harbor workers Act." (Tr. 297-314; CX-68).

E. Testimony and Vocational Records of Jerry George Albert

Albert is a vocational rehabilitation counselor retained by Employer; his charges amounted to $7,000 at a rate of $80 per hour. Albert testified he understood a carpenter foreman's job was to supervise and coordinate the activities of workers in constructing, installing and repairing ships. (Tr. 239, 246-47; EX-60). Albert conducted a job accommodation analysis in May, 2002. Based on Claimant's medical records, he testified an FCE placed Claimant at the medium work level; however, Dr. Durfey restricted Claimant from any work and Dr. Derbes released him only to part-time light duty work. Albert testified Dr. Renick

also restricted Claimant from working, but Dr. Witkind placed no restrictions on Claimant's ability to work. (Tr. 248-53).

Albert interviewed Claimant on January 23, 2004, for about one hour. Claimant informed Albert his overall pain level was a 7 or 8; specifically, he complained of low back burning, numbness in the right leg, bilateral elbow pain, headaches, shoulder and neck pain. He reportedly could not sit, stand or walk for longer than 15 to 20 minutes at a time, he could only lift 10 pounds and kneeling, squatting, stooping and bending all increased his pain. Climbing more than 3-5 stairs also increased Claimant's low back pain. Finally, Albert testified Claimant could only drive about 26 miles at a time. (Tr. 255-57; EX-60, p. 5). Albert stated Claimant had a 10th grade education and held previous jobs as a grocery store bagger, dishwasher, cook, and assistant manager. Claimant was not interested in obtaining his GED. Employer first hired Claimant in 1984 as a welder/tacker, then carpenter, and eventually promoted him to foreman. Albert testified the foreman job was light duty and the carpenter position was medium duty. As a foreman, Claimant was responsible for directing his subordinates, leadermen, and carpenters. Claimant informed Albert his post-injury job at Employer was 40% administrative paperwork, and 60% hands-on carpentry; Claimant was not comfortable working in the shipyard setting. Albert reported Claimant had not actively searched for employment in the year before his interview, and had not registered with any job placement agencies. (Tr. 257-67; EX-60, pp. 13-14).

Albert's job accommodation analysis was based on Claimant's capabilities of medium to light duty jobs, given his physical restrictions. An updated labor market survey, conducted in December 2003-January 2004, identified several jobs within these categories available to a person with Claimant's background. Albert testified he felt the positions at Super 8 motel, Sykes, Inc. and Taco Casa were most suitable for Claimant; the remaining positions in his labor market survey may not be as ideal given changes in the job descriptions during Albert's follow-up calls. (Tr. 269-73). However, on cross-examination, Albert testified he did not know if Claimant was capable of front desk work, typing, or lifting more than thirty pounds. (Tr. 282-85). The jobs identified by Albert as suitable for Claimant and in his geographic location are as follows:

Date	Employer	Job Title	Physical Demand	Hourly Pay
12/26/03	Cingular Wireless	Cust. Serv. Representative	Light duty; stool avail.	$7.00
1/6/04	Super 8 Motel	Front desk clerk	Light duty	$5.15
1/7/04	ARC-Washington Holmes Counties	Rest area attendant	Alternate standing and walking, lift 40 lbs.	$5.15
1/7/04	Sykes, Inc.	Cust. Serv. Representative	Sedentary; will train	$7

1/5/04	Taco Casa	Cashier/Counterperson	Frequent standing, occ. Walking, lift 30 lbs.	$5.15
1/5/04	Rustler's Reef	Host/Cashier	Alt. sit, stand, walk	$6.00
1/5/04	Gyro Café	Cashier	Freq. standing, occ. Walking; lift 20 lbs.	$7
1/5/04	Jimmy's Restaurant	Cashier; Cook	Freq. standing, occ. Walking, lift 30 lbs.	$5.35
1/5/04	Country Inn & Sts.	Front desk clerk	Freq. standing, occ. Walking, lift 10 lbs.	$6.50
1/5/04	Holiday Inn Select	Night auditor; front dk clerk	Sedentary/light	$7-$9
1/5/04	Domino's Pizza	Delivery Driver	Alt. sit, stand, walk; lift 25 lbs.	$5.35 + tips + $.75/mile
1/5/04	Hampton Inn	Front Desk Clerk	Alt. stand/walk, lift 20 lbs.	$7-8
1/22/04	Beeline Convenience Stores	Cashier/Assistant manager	98% standing; lift 20 lbs.	$7

(EX-60, pp. 15-32).

Albert testified these jobs constituted suitable alternative employment based on the restrictions of Dr. Chokhawala and Dr. Witkind. However, Albert also testified that Dr. Reed, Dr. Chokhawala and Dr. Witkind all opined Claimant could physically perform the job of carpenter foreman. (Tr. 272-73). On cross-examination, Albert testified if equal weight was given to Claimant's treating psychiatrist, psychologist and pain management specialist, then he would be unemployable. Albert also acknowledged the fact that Dr. Chokhawala initially opined Claimant was in need of psychiatric care for mood and anxiety disorders, stating a lack of compensation benefits could further worsen his recovery. Albert did not contact Dr. Chokhawala regarding Claimant's moderate impairment of social functioning, concentration and adaptation. (Tr. 275-78).

Albert further testified on cross-examination that after terminating Claimant, Employer would not or did not support Claimant to return to work. He also stated Employer did not offer Claimant a modified job which met his physical restrictions; he helped design the job Claimant returned to after his injury. However, he noted Claimant's description of the job was overall more strenuous than the description provided by Employer. Finally, Albert testified there was no data to support the results of the FCE. (Tr. 290-94).

F. Testimony of Dr. Bruce Witkind

Dr. Witkind is a board certified neurosurgeon, although he only performed 15 surgeries in 2003. He testified he is currently conducting a study of brain tumors through the NIH and has not published an article in 20 years. His charges for examining Claimant and testifying at the hearing totaled $9,500; only about 5% of his income comes from the practice of medicine. On cross-examination, Dr. Witkind testified the charges for his services in this case totaled $10,400. He has only conducted 4 or 5 independent medical examinations, and is not certified in pain management or psychiatry. (Tr. 142-43, 151-52, 188).

Dr. Witkind reviewed Claimant's medical records, including the MRI of February 20, 2003. However, on cross, he testified he did not read Dr. Finch's deposition, or all of Dr. Derbes' deposition. Additionally, Dr. Witkind did not review the pre-surgery MRI; he did not talk with Dr. Reed and only skimmed over Dr. Reed's deposition. Dr. Witkind testified on cross-examination that everything Drs. Reed and Durfey stated was medically appropriate. He testified Dr. Reed found a ruptured disc at L4-5 and performed surgery to correct it. Dr. Reed considered the surgery a success because it eliminated the radicular pain, although the back pain remained. Dr. Witkind examined Claimant on January 12, 2004. In total, the examination and review of Claimant's medical records took only 6 hours, with the exam itself only 30 minutes in length. Claimant presented with numbness in his right leg, pain in the right big toe, persistent headaches, and pain in the neck, shoulders and elbows. An electric diagnostic study was normal, and Dr. Witkind noted Claimant was taking Oxycontin, Vicaforte, Gabitril, Xanaflex, Effexor and Sonata; however, he was unaware Dr. Reed prescribed Soma, Lortab and Oxycontin from April 2001 through February 2003. (Tr. 171, 195-203, 210-12). Dr. Witkind focused the exam on Claimant's mental status, cranial nerves, sensory, motor and reflex abilities. He had difficulty conducting the exam because Claimant laid in the fetal position. Nonetheless, Dr. Witkind testified the examination was positive for four of five Waddell signs; three positive Waddell signs indicates somatization by the patient. Specifically, Claimant reported pain on the skin, had difficulty holding his head up, reported glove and stocking pain over the whole leg absent objective organic findings, and had breakaway weakness, or cogwheeling, in his muscles. Dr. Witkind did not test the 5th sign, axial loading. Claimant reported pain at 10 degrees during the straight-leg test; Dr. Witkind testified this is a somatic complaint and is consistent with the Waddell signs. (Tr. 172-76).

Dr. Witkind agreed with Dr. Reed in that he did not relate the headaches to Claimant's low back injury, but opined Claimant needed pain management. Dr. Witkind also testified Dr. Reed refused to perform further surgery with 4 positive Waddell signs. Dr. Witkind testified Claimant ruptured his L4-5 disc, but his complaint of pain in his upper back, neck, shoulders and persistent headaches were somatic in nature and needed to be evaluated. However, he further testified the Waddell signs were not related to anxiety or depression, which could affect symptom magnification. Also, Claimant had consistent complaints of pain over a period of three years. On cross-examination, Dr. Witkind testified disc material contacting nerve roots does not produce radicular symptoms such as those suffered by Claimant. Dr. Witkind opined Claimant's February 20, 2003 MRI was normal except for minimal scarring secondary to the surgery; he further testified he agreed with Dr. Reed's interpretation of the MRI. (Tr. 176-84, 187, 197, 200, 212). He also testified he agreed with Dr. Reed that Claimant did not need further surgery or physical therapy, and should be taken off Oxycontin. (Tr. 184). Dr. Witkind acknowledged, however, that Dr. Derbes stated Claimant was compliant with medication protocols and was not addicted or abusive of his medications. (Tr. 213-14).

Dr. Witkind testified the medical reports and FCE indicated Claimant was released to medium duty work, which he agreed with. He further acknowledged the FCE was not supported by statistics, lasted less than one hour and lacked detail; as a neurosurgeon he generally does not depend on FCEs but testified it is better to have the person actually return to work and see if he can perform the duties. (Tr. 184, 205-10, 233-36). Dr. Witkind did not approve any of the jobs identified by Albert, and testified Claimant was capable of performing a modified job at Employer. (Tr. 225, 233).

G. Exhibits

(1) Deposition and Medical Records of Dr. William W. Reed

Dr. Reed is a board-certified orthopedic surgeon with a sub-specialty in spinal disorders. Claimant was referred to him on April 11, 2001, from the Bay Walk-in Clinic. At this initial exam, Dr. Reed testified Claimant presented with complaints consistent with a disc herniation at the L4-5 level, and that was his diagnosis. Claimant's pain was moderate to severe, and his symptoms were present

all the time. On April 24, 2001, Dr. Reed performed a micro-diskectomy at the L4-5 level; his pre-operative diagnosis was a herniated disc at L4-5 with radiculopathy, or a pinched nerve. Dr. Reed testified his post-operative diagnosis was the same; although Claimant's leg pains improved, he still suffered back pains. (JX-3, pp. 4-7, 180-82). At his May 7 follow-up appointment, Claimant's condition was improved, but he remained off work. On June 12, 2001, Claimant presented to Dr. Reed with chronic headaches he reportedly suffered since the surgery; he also complained of stiffness and soreness in his neck, although his back and leg pain was better. *Id.* at 177-78.

Claimant next treated with Dr. Reed on July 5, 2001, at which time he was doing better, but still suffered cervical headaches as well as pain in his neck. Dr. Reed noted normal gait and full range of motion in Claimant's cervical spine, with minimal discomfort. Dr. Reed testified Claimant's upper back and neck pains were not related to his work injury. Additionally, he testified 4 of 5 Waddell signs were present; specifically, Claimant had tenderness to skin pinch in his back and twisting of the hips and movement of the head caused pain in his lower back. These complaints were inconsistent with structural problems related to Claimant's herniated disc; Dr. Reed testified the signs indicate a significant psychological overlay of Claimant's symptoms, and possibly symptom magnification. (JX-3, pp. 8-10, 176). On August 8, 2001, Claimant complaint of low back pain, although he did not experience radicular symptoms, pain with bending and decreased range of motion secondary to discomfort. Dr. Reed released Claimant to light duty work with restrictions of a 4-6 hours work day including 15 pounds lifting, no sitting or standing longer than 30 minutes, no overhead activity and no bending or stooping. On September 17, 2001, Dr. Reed recommended pain management and a decrease in Claimant's medications. He opined Claimant achieved MMI with a 9% impairment rating and recommended an FCE, which was performed by Brian Cox on September 27, 2001. *Id.* at 86, 175-76. The FCE report was one page in length and lacked statistical support for its conclusions. Furthermore, it only took place in one day. However, Mr. Cox found Claimant capable of lifting up to 30 pounds; frequent sitting, standing, walking, crawling and kneeling; and occasional bending, squatting and climbing a ladder. This, however, did not conform with Claimant's job duties and Mr. Cox placed him at medium work level restrictions for an 8 hour day. (JX-12, p. 2). Dr. Reed concurred with the FCE and released Claimant to medium duty work, but restricting him to lifting no more than 30 pounds, not standing or sitting longer than 30 minutes, and minimal stooping and bending. At the October 31, 2001 follow-up appointment, Claimant exhibited no signs of tension and full motor skills; Dr. Reed released him to medium duty work. (JX-3, pp. 10-11, 174).

On August 13, 2002, Dr. Reed approved Jerry Albert's Job Accommodation Analysis, and on October 27, 2002, he approved Employer's modified position of carpenter foreman as appropriate according to Claimant's 2001 FCE. (JX-3, pp. 11-12, 92-98). On January 10, 2003, Dr. Reed informed the claims adjuster it was medically necessary to refer Claimant to a psychiatrist. He next treated Claimant on February 19, 2003; Claimant walked slow with a slightly antalgic gait and continued to exhibit the same Waddell signs Dr. Reed noted in July 2001. Claimant also complained of back pain, bilateral heel burning and right hip pain. X-rays indicated a narrowing of the disc space at L4-5 and L5-S1, but Dr. Reed testified there was no major instability; Claimant's condition had more to do with his biomechanics and degenerative changes. Dr. Reed testified he recommended imaging of Claimant's lumbar spine, but Claimant was unable to undergo the EMG nerve conduction study because he could not tolerate the pin placement. He placed Claimant on sedentary work duty. (JX-3, pp. 13-14, 174). Dr. Reed last treated Claimant on March 19, 2003. An MRI of Claimant's lumbar spine on February 20, 2003, confirmed the narrowing at L4-5 and L5-S1 as well as mild stenosis of the spinal canal, but did not reveal any nerve root impingement. *Id.* at 14-15, 157-58. At his deposition, Dr. Reed was provided with a copy of Dr. Elzawahary's March 7, 2003, NCV/EMG studies of Claimant's back. Dr. Reed testified this contradicted his prior testimony and medical reports, as Claimant was indeed able to tolerate the studies, which revealed Claimant did not suffer chronic nerve damage, instability or peripheral neuropathy. Dr. Elzawahary opined he was not a candidate for further surgery. At his final examination of Claimant, Dr. Reed diagnosed Claimant with lumbar degenerative disc disease with no radiculopathy or instability and recommended symptomatic treatment; he acknowledged Claimant experienced intermittent radicular symptoms post-operation. Dr. Reed testified as of March 19, 2003, Claimant was capable of working medium duty work and any physical findings were degenerative in nature. *Id.* at 16-18, 27, 173.

Dr. Reed testified he was concerned about prescribing narcotic medication to Claimant, who exhibited signs of symptom magnification and depression. He personally prescribed Soma and Lortab, which he testified were shorter-acting, weaker narcotics. Dr. Reed added he prefers sending patients to pain management for medications. He testified Claimant was on a number of strong medications, including Oxycontin, Zanaflex, and Celebrex. These medications, including the Soma and Lortab, can all be addictive; Dr. Reed testified Dr. Durfey filled Claimant's prescriptions. Dr. Reed testified he deferred to Dr. Derbes, Dr. Durfey and Dr. Chokhawala as to Claimant's condition after March 2003, his pain management as well as his psychiatric restrictions. He maintained that structurally

Claimant was capable of working, although he conceded that other components may impact a patient's ability to function. (JX-3, pp. 20-24, 29-30, 34-36).

Dr. Reed also testified he did not believe Claimant had ever returned to work. Upon being informed of Claimant's 7-month return to work post-operation, he stated positive Waddell signs and an unsuccessful return to work indicates underlying psychological issues. (JX-3, pp. 31-33). He acknowledged pain is a subjective complaint and that the AMA recognizes persistent complaints of pain as a permanent condition. However, Dr. Reed testified Claimant's 2 years of pain complaints do not warrant additional impairment. *Id.* at 38-39.

(2) Deposition and Medical Records of Dr. Thomas Derbes

Dr. Derbes is board-certified in neurology, psychiatry and pain management. He first examined Claimant on June 9, 2001, on a referral from Dr. Reed.[2] Claimant presented on October 9, 2001, with headaches, neck aches, mid and low back pain, and antalgic gait. Dr. Derbes testified he diagnosed Claimant with chronic low back pain and lumbar laminectomy. Dr. Derbes testified Claimant's subjective complaints placed his pain at an 8-9 out of 10; this was not consistent with Dr. Derbes' objective physical findings, on which he based his opinion Claimant was only in mild pain. However, Dr. Derbes testified the record did not support a finding of symptom magnification in Claimant, adding he found Claimant to suffer anxiety. He prescribed massage therapy, which was authorized by Employer, and released Claimant to part-time, light duty work. Specifically, he restricted Claimant to lifting no more than 20 pounds as well as no prolonged bending, stooping, squatting, kneeling, static squat, ladder climbing, crawling or repetitive use of the legs. Claimant attended 12 message therapy sessions between October 16, 2001 and January 2, 2002, but they did not provide him much relief. Claimant remained in extreme pain and was only able to tolerate mild to moderate pressure secondary to discomfort. (JX-51, pp. 3-6, 8-10; JX-52, pp. 10-12, 13-34, 54).

Dr. Derbes testified he was not in favor of treating chronic pain with opiod medications, such as Lortab and Oxycontin, and did not prescribe these medications to Claimant. On cross-examination he testified Dr. Reed had already

[2] Dr. Derbes testified on cross-examination that he only treated Claimant for four months prior to his February 5, 2002, termination of care. This places his initial evaluation at or around October 2001. Indeed, the first visit included in Dr. Derbes' report is of October 9, 2001, and is consistent with the substance of his testimony at hearing. As there are no records for any treatment prior to October 9, 2001, I find this to be the date Dr. Derbes initiated treatment of Claimant. (JX-51, p. 26; JX-52, pp. 10-12).

prescribed Claimant Soma and Lortab. However, Dr. Derbes preferred other modalities of treatment, including non-opiod medications, therapy and injections. Claimant did not continue treating with Dr. Derbes past February, 2002, because the protocols recommended were not what Claimant sought. *Id.* at 6-8. Dr. Derbes further testified Claimant's back pain was presumably secondary to his work accident and subsequent surgery. Since there was no evidence of intervening accidents, he testified his case management was due to the accident and surgery. *Id.* at 26, 40.

Dr. Derbes concurred with Dr. Reed's release of Claimant to medium duty work pursuant to the September 27, 2001 FCE. Specifically, on October 29, 2001, Dr. Derbes approved Employer's modified position of carpenter foreman as a suitable job for Claimant. However, his November, 2001, release of Claimant to medium duty work was based only on physical restrictions and limitations; Dr. Derbes testified he did not take into consideration Claimant's psychiatric restrictions when releasing him to work. (JX-51, pp. 11, 36; JX-52, p. 52). Claimant did not show up for his November 16, 2001 follow-up appointment to receive injections. Dr. Derbes testified Claimant was reportedly not attending therapy sessions, but his records indicated the opposite; Claimant attended the therapy sessions but did not receive relief from them. He stated Claimant's treatment plan up to that point represented palliative care, and thus, assigned an MMI date of November 15, 2001. Claimant stopped by Dr. Derbes' office on December 5, 2001 to request a prescription for Lortab and Soma, which the doctor refused to fill. Claimant refused injections at this time. On cross-examination Dr. Derbes clarified he recommended facet blocks, or cortisone injections into Claimant's spine, to decrease his pain and improve his functioning. If these had not been effective, he would have considered epidural injections. (JX-51, pp. 12-13, 38-39).

At Claimant's January 30, 2002 follow-up appointment, Dr. Derbes diagnosed him with chronic low back pain secondary to surgery. He discussed with Claimant various treatment options, including medication, therapy and modified activities. Dr. Derbes also discussed narcotic medication versus non-narcotic medications and the risk of addiction and physical dependency. Dr. Derbes testified Claimant chose not to pursue the treatment offered, thus he prescribed Ultram, an uncontrolled narcotic pain medication, and instructed Claimant to return as need. On February 4, 2002, Claimant reported problems with the Ultram, but Dr. Derbes testified he refused to prescribe stronger medication. Claimant requested to be released from Dr. Derbes' care, and a termination letter was signed on February 13, 2002. *Id.* at 14-15.

Dr. Derbes testified he was troubled by the fact that Claimant focused on his medications during his treatment; Dr. Derbes did not feel opiods were appropriate and was concerned Claimant would become addicted. However, Dr. Derbes testified Dr. Durfey's prescription of opiod medications to Claimant was not a deviation of standard care and Claimant's September 19, 2003, urinalysis indicated he was taking the medication according to his doctors' protocols. Additionally, he testified the amount of opiods prescribed by Dr. Reed was not enough to cause Claimant to become physically dependent on them. Nothing in the record supported a claim that Claimant was addicted to his pain medication. Dr. Derbes emphasized that the use of opiod medication to treat chronic pain is a personal preference that varies from doctor to doctor; he considered it an appropriate modality to reduce pain when combined with other protocols and carefully monitored through urine screening. Dr. Derbes even stated his prescription of Ultram in January 2002 indicated he was not too concerned about Claimant's reliance on opiates. On cross, Dr. Derbes testified if he had seen evidence of aberrant drug behavior, he would have recorded his findings and recommended Claimant to a detoxification program. (JX-51, pp. 16-24, 27-31).

Dr. Derbes further testified that although he terminated Claimant's treatment, he still felt it was important for Claimant to receive follow-up care to minimize his pain and improve his functioning. He was aware Claimant was treating with Dr. Durfey; however, Dr. Derbes testified he would not defer to Dr. Durfey regarding Claimant's work restrictions. Dr. Derbes testified he had more confidence in Dr. Reed's opinions regarding work restrictions, and when he was informed Dr. Reed had deferred to Dr. Durfey, Dr. Derbes maintained his deferral to Dr. Reed, and thus, in turn, Dr. Durfey. Dr. Derbes testified he did not recall if psychiatric care was provided Claimant during his treatment. He was unaware Claimant treated with Dr. Rennick and Dr. Finch for depression secondary to the industrial accident, but he thought it was probably a good idea. Dr. Derbes deferred to Drs. Finch and Rennick as to Claimant's psychiatric condition. (JX-51, pp. 30-35, 40).

(3) Deposition and Medical Records of Dr. John Q. Durfey

Dr. Durfey is board certified in anesthesiology with fellowship training in pain management. He began treating Claimant for pain management on or about November 2002, upon referral from Dr. Reed. Dr. Durfey's records, however, indicate Claimant was referred to him on September 10, 2002. At his initial evaluation of Claimant, Dr. Durfey found him post-operational diskectomy with residual pain and a history of nerve damage in his lower back. Dr. Durfey testified

his planned treatment included physiotherapy, water therapy, and psychiatric assistance for depression and anxiety to improve his function and minimize his pain. He clarified that Claimant's anxiety and depression were the result of his work accident and injuries. (JX-5, pp. 3-6, 10-11, 14; JX-6, p. 79). Dr. Durfey testified he recommended these same treatments to other patients with situations similar to Claimant's; however, he experienced problems with getting procedures authorized by the claims' adjustor. Specifically, Dr. Durfey testified physical, message and vitamin therapies were not authorized; only one session of water therapy was authorized and some of the medications were authorized. Additionally, Claimant was not receiving any workers' compensation benefits which rendered him destitute and added to his depression. (JX-5, pp. 13-15).

Dr. Durfey testified that the lack of authorization for the various therapies he recommended Claimant undergo obligated him to prescribe more medications to help ease Claimant's pain. On November 13, 2002, Claimant complained the medications made him sick and dizzy; Dr. Durfey placed him on a trial of Oxycontin for his pain. At Claimant's December 12, 2002 follow-up appointment, his urinalysis was consistent with his medication protocol. On January 9, 2003, Claimant reported to Dr. Durfey that aquatic therapy was helpful, but had not been authorized by Employer/Carrier. (JX-5, p. 16; JX-6, pp. 43-45, 48). On February 6, 2003, Dr. Durfey noted workers' compensation had denied authorization for electrical physiologic testing. Dr. Durfey testified that his treatment of Claimant included physical and neurological exams, as well as evaluations of his physical and mental condition. Claimant was sent to Dr. Derbes and then Dr. Elzawahry for neurological testing. Dr. Durfey testified that on March 19, 2003, Claimant was post-EMG/NCV testing, but could not actually undergo the tests secondary to discomfort with the pin placement. He explained that a normal NCV test indicates the nerves are transmitting impulses, including pain. It does not indicate a lack of pain. A normal EMG measure whether the muscles are innervated; Dr. Durfey testified that such a result in March 2003 would have been inconsistent with his clinical findings of atrophy and weakness in Claimant's legs. (JX-6, pp. 5-9; JX-5, pp. 39-41).

At his deposition, Dr. Durfey testified Claimant continued to experience severe pain, was unable to sit or sleep, had difficulty standing and was depressed because of his lack of income. Claimant was taking Sonata, Gabitril, Effexor, Zanaflex, Oxycontin, Celebrex, myofascial pain medication and various vitamins; all his medications were authorized at the time of Dr. Durfey's deposition. Dr. Durfey testified that for Claimant to be able to reach MMI his recommendations needed to be followed. Claimant underwent one session of massage therapy on

March 29, 2003, but could not tolerate it secondary to pain. Dr. Durfey thus prescribed moist heat, stretching and water therapy. He added that he was comfortable prescribing opiate medication, Oxycontin was appropriate for Claimant, and Claimant exhibited no signs of addiction or aberrant drug use. (JX-5, pp. 16-23, 45-48). Dr. Durfey clarified that non-narcotic and barbiturate medications can be as addictive as narcotics. (JX-5, p. 33).

Dr. Durfey testified his treatment of Claimant depended on his subjective complaints of pain, thus Claimant's veracity was a factor in the treatment. He did not see any indication of malingering or lack of motivation on behalf of Claimant; rather, Dr. Durfey testified Claimant was compliant with medical recommendations when they were authorized, and displayed a consistent desire to improve his condition. (JX-5, pp. 19, 34, 51). Moreover, Dr. Durfey testified the changes present in Claimant's February 20, 2003 MRI constitute an anatomically good reason for his pain, atrophy and weakness. Dr. Durfey deferred to Dr. Reed regarding Claimant's orthopedic condition, upon consultation. He testified that Claimant's functional limitations render him very disabled. Dr. Durfey stated vocational rehabilitation would be good and he agreed to review possible jobs for Claimant, but emphasized that Claimant's condition would be a hinder to his employment. (JX-5, pp. 56-58).

(4) Deposition and Medical Records of Dr. John T. Renick

Dr. Renick is a board-certified psychiatrist, approved for workers' compensation and as an expert medical examiner. He testified he first saw Claimant in February, 2003, and has since treated him on a monthly basis. Dr. Renick was provided a history of Claimant's accident and subsequent medical treatment; he was also aware Claimant attempted to return to work in 2001, but was let go because of his restrictions. (CX-65, pp. 3-6). Dr. Renick's initial diagnosis of Claimant was depression caused by his industrial accident and resulting pain and disability. He testified Claimant suffered significant pain disorder with both physical and psychological factors, the latter of which affected his ability to cope and communicate. Dr. Renick testified Carrier authorized his treatment of Claimant and approved his recommendations, including his referral of Claimant to Kenneth Finch for cognitive behavioral therapy. *Id.* at 7-9.

Dr. Renick testified he rendered Claimant unable to work, from a psychological standpoint, in March, 2003. Specifically, he testified Claimant suffered severe anxiety and depression, an inability to focus or concentrate and a negative self-image. On cross, Dr. Renick testified Claimant's no-work status was

secondary to chronic pain, pain medications, anxiety and depression. He opined that Claimant's condition would render it impossible for him to function in a work situation. Dr. Renick was not concerned about placing Claimant on no-work status prior to March, 2003, because he testified Dr. Reed already restricted Claimant from working. (CX-65, pp. 9-10, 19, 22). Dr. Renick was aware of Dr. Durfey's physical restrictions on Claimant's ability to work, and added that he kept Employer/Carrier informed of Claimant's condition and related work status. Despite his opinion that Claimant could not work, Employer informed him no benefits would be paid to Claimant. Dr. Renick testified Employer/Carrier's failure to follow his recommendations and acknowledge Claimant's inability to work worsened Claimant's psychological condition. Specifically, Dr. Renick opined Claimant's depression and anxiety were caused by his diminished functional capacity, chronic pain and lack of money; his no-work status was predicated on the delay in recovery due to Claimant's financial stress. *Id.* at 13-14, 17.

Dr. Renick testified he was provided a copy of Dr. Chokhawala's report of his psychiatric IME of Claimant. Dr. Renick clarified the diagnosis of "mood disorder secondary to physical condition" was not a DSM-IV diagnosis, although Dr. Chokhawala's diagnosis was substantively similar to Dr. Renick's opinions. (CX-65, pp. 14-15). Dr. Renick testified he did not have objective tests to diagnose Claimant's psychiatric condition, although his diagnosis was confirmed by Dr. Durfey, Dr. Chokhawala, Dr. Finch, Shelly Thompson and Mrs. Fuller. While he opined psychiatric treatment and vocational assistance would help Claimant, returning to work before receiving psychiatric treatment would not be beneficial. (CX-65, pp. 16, 28). Dr. Renick testified that on June 17, 2003, Claimant was "doing better" than the week before, when he was in a lot of anger toward his family, resulting in the police being called to his home. The notation in Dr. Renick's July 15, 2003 record that Claimant could work was a mistake; Claimant was unable to work as of that date. On August 15, 2003, Dr. Renick noted Claimant appeared more depressed, fatigued and had problems concentrating. On October 18, 2003, Dr. Renick diagnosed Claimant with major depressive disorder and pain disorder. (CX-65, pp. 23-24; CX-65(b), pp. 4-7).

Additionally, Dr. Renick testified he has not placed Claimant at MMI, and Claimant did not exhibit any signs of drug addiction. Dr. Renick was trained to notice addictive behavior disorders and had past experience with drug abusers. While he was aware Claimant was on Oxycontin, he testified Claimant was not addicted to the drug. (CX-65, pp. 33-34).

(5) Deposition and Medical Records of Dr. Kenneth A. Finch

Dr. Finch is a licensed mental health counselor, certified traumatologist and cognitive behavioral therapist. He first saw Claimant on February 27, 2003, on a referral from Dr. Renick; Dr. Finch testified his treatment of Claimant was authorized by Employer/Carrier. Dr. Finch understood Claimant was injured at work in March 2001 and attempted to return to work on July 27, 2002, but was let go because of his physical restrictions. (CX-64, pp. 3, 6-7). His initial diagnosis of Claimant was acute adjustment disorder with anxiety and depression. Dr. Finch treated Claimant on a weekly to bi-weekly basis; after 6 months he diagnosed Claimant with chronic adjustment disorder caused by his industrial accident. On or about March 2, 2003, Dr. Finch restricted Claimant from working secondary to his chronic pain and inability to cope; he testified Claimant continues to be off of work. *Id*. at 7-10.

Dr. Finch testified Claimant's financial problems are an additional stressor, but he continues to suffer chronic pain and anxiety. He stated Claimant dealt with his depression through anger, causing arguments at home and resulting in his moving out of the house. Dr. Finch clarified Claimant was not suicidal, but did express hopelessness and powerlessness. The cognitive behavioral therapy administered by Dr. Finch included grounding techniques, relaxing techniques and learning how to vent and express stress appropriately. (CX-64, pp. 13-14).

Dr. Finch further testified that although Claimant was compliant with his instructions and did not exhibit signs of malingering, the positive Waddell signs reported by Dr. Reed were cause for examining any secondary gains. However, he testified Claimant was excited about the possibility of returning to work. Additionally, Dr. Finch testified he did not notice any signs of drug abuse on behalf of Claimant. Dr. Finch stated he would defer to any co-treating psychiatrist and testified Claimant may be ready for re-training in a less physical labor. (CX-64, pp. 14, 18, 20, 26, 29, 31-33).

(6) Deposition and Medical Records of Dr. Pankaj Chokhawala

Dr. Chokhawala is a psychiatrist who performed independent medical examinations of Claimant, on behalf of Employer/Carrier, on April 22, 2003 and January 13, 2004. He testified by deposition on September 9, 2003, and January 27, 2004. Each evaluation lasted approximately 75 minutes in length; IME's comprise 20% of Dr. Chokhawala's practice, including both patient and insurance company cases. Dr. Chokhawala testified that at the initial evaluation in April,

2003, Claimant complained of pain in his back, neck, shoulders and leg; he also felt depressed because he could not do anything. (EX-56, pp. 4-7, 19-20). Dr. Chokhawala noted Claimant was dressed neatly and well-groomed, indicating his depression did not prevent him from maintaining his appearance. Claimant sat in a peculiar position for comfort. He also expressed a lot of anger and frustration toward Employer; however, Dr. Chokhawala testified Claimant was able to separate out this anger, and was pleasant and cooperative during the interview. Claimant did not exhibit any sign of thought disorder. *Id.* at 8-9. At the second evaluation in January, 2004, Claimant presented with the same physical and psychological complaints. However, Dr. Chokhawala noted Claimant could sit in one position, indicating possible exaggeration of his physical condition at the April 2003 meeting. Additionally, Claimant did not rant and rave about Employer/Carrier as much as in April, 2003, signaling to the doctor that he had come to accept the situation. (EX-57, p. 3; EX-61, p. 6). Dr. Chokhawala testified that at each meeting Claimant was on a number of medications, but he did not know when or if Claimant actually took the medications before the meeting. If Claimant were on medication during the interview, Dr. Chokhawala testified it could alter Claimant's appearance and behavior. (EX-56, p. 22; EX-61, p. 30).

Dr. Chokhawala diagnosed Claimant with mood disorder secondary to physical condition, that being his chronic pain. He testified Claimant's work restrictions were solely physical; he suffered no psychiatric limitations. Dr. Chokhawala opined there was no reason Claimant could not function in the world, it may even be therapeutic for him. He opined Claimant suffered deficits in adaptation and social functioning, but they do not affect his ability to understand or remember workplace procedures and instructions. Dr. Chokhawala did opine, though, that the deficits may result in Claimant's reduced ability to handle criticism, and he had a tendency to get angry or hostile. However, this sensitivity was not necessarily a psychiatric condition, according to Dr. Chokhawala, and would not prevent a person from working or impair Claimant's ability to get along with others. (EX-56, pp. 13-15; EX-61, pp. 49-52, 56). Dr. Chokhawala assigned Claimant a Global Assessment of Functioning rating of 65, indicating he had some difficulty in social and occupational functioning but generally functioned pretty well. (EX-61, p. 54).

Dr. Chokhawala additionally testified Claimant's condition could not be properly treated with medication; the best therapy would be to treat the source of Claimant's condition, his pain. (EX-56, pp. 13-16). At both of his depositions, he recommended palliative care from Dr. Finch would be appropriate treatment for approximately 6-9 months, eventually phasing out Claimant's sessions over time.

However, in January, 2004, he indicated Dr. Finch's therapy had not resulted in major improvement of Claimant's condition. *Id.* at 16-17; (EX-61, pp. 17-18, 54). Dr. Chokhawala testified in January, 2004, that Claimant's condition remained essentially unchanged; therefore, he placed Claimant at MMI for his psychiatric condition in May, 2003. (EX-61, pp. 16-18).

Dr. Chokhawala initially testified he had no opinion and conducted no testing to determine if Claimant was a malingerer. (EX-56, p. 25). However, he later testified Claimant was overdramatic at the April, 2003, meeting and continued to magnify his discomfort emotionally in January, 2004. Dr. Chokhawala testified Claimant did not appear depressed at the second evaluation, but that he was "pretending to be upset". To support his opinion, Dr. Chokhawala testified Claimant exhibited good memory, average insight, intelligence and judgment, and did not present with any psychomotor retardation. To the doctor, Claimant appeared to be alright, yet he complained he was falling apart. (CX-61, pp. 10-13, 15-16, 39). Dr. Chokhawala testified Dr. Reed's and Dr. Witkind's findings of symptom magnification corroborated his findings that Claimant pretended to have more problems than he actually did. *Id.* at 13.

Dr. Chokhawala also testified he was unaware Employer/Carrier was not paying Claimant benefits or authorizing medical treatment. In January, 2004, he acknowledged financial difficulty was one of Claimant's symptoms. These actions by Employer/Carrier probably had a negative affect on his mood disorder and may have accelerated the maturation of his psychiatric condition. However, Dr. Chokhawala added that returning to work and earning a regular income would improve Claimant's psychiatric stress over his finances. (EX-56, pp. 35-38; EX-61, pp. 18, 32).

(7) Deposition of Jerry Adato

Adato is a licensed vocational rehabilitation counselor hired by the Claimant to evaluate his vocational prospects. Adato testified he conducted a phone interview with Claimant on January 16 or 19, 2004, which lasted under one hour. He also reviewed Claimant's medical records and the Employer/Carrier's trial exhibits. (CX-63, pp. 3-6). Adato's testimony focused on the inconsistencies in the FCE and the work restrictions imposed by Claimant's physicians, as well as the likelihood of Claimant's return to work. He was made aware that Dr. Reed released Claimant to medium duty work in September, 2001, but restricted him to sedentary work in February, 2003; Dr. Derbes released Claimant to light-duty work; Dr. Durfey, Dr. Renick, Dr. Finch all place Claimant on no work status; Dr.

Chokhawala opined Claimant could work within physical restrictions; and Dr. Witkind released Claimant to full duty work.

At the outset, Adato testified the FCE conducted in September, 2001, was not consistent with the Dictionary of Occupational Titles. Specifically, the FCE restricted Claimant from lifting more than 30 pounds, bending or stooping, and sitting or standing longer than 30 minutes at a time; it classified this as "medium" duty work. However, Adato testified that the DOT describes "medium" duty work as lifting 25-50 pounds regularly and standing 80% of the time, or 6 hours a day. Additionally, Adato opined the minimal bending and stooping restriction was more in line with sedentary work duties. He testified this FCE in effect puts Claimant at light to sedentary work restrictions. (CX-63, pp. 10-12, 35).

Adato testified Claimant's position as carpenter foreman, to which he returned in September, 2001, was medium duty work and required him to perform management tasks as well as hands-on carpenter work. As foreman, Claimant was required to perform the tasks of the men he supervised, and was called on to demonstrate some of the duties to his subordinates. To this end, the job duties exceeded his physical restrictions; however, Adato testified Claimant was probably capable of instructing one of his subordinates to do the activities that were too strenuous for him. However, he further testified Claimant's supervisory duties may require him to climb, bend, or crawl, which were not within his restrictions. (CX-63, pp. 16, 19-22, 24, 30). Adato testified the job accommodation assessment prepared by Jerry Albert did not conform to the job's actual requirements. Specifically, the assessment indicated Claimant would be required to lift no more than 2 pounds; however, the job required Claimant to do the actual tasks the carpenters performed, which sometimes exceeded medium lifting requirements of 25-50 pounds. *Id.* at 23-24. According to his conversation with Claimant, Adato testified Claimant attempted to return to the accommodated position of carpenter foreman, but only lasted a few months before being transferred to the carpenter's shop. There, Claimant "did nothing" 75% of the time, and spent the remainder of his time cutting stencils for life jackets, cutting small items, taking some inventory and performing foreman type work. (CX-63, pp. 15-16).

Adato testified he placed more weight on the opinions of doctors who know a patient best. Considering the FCE and psychosocial restrictions, he opined Claimant was unemployable. However, if Claimant's condition improved with treatment, Adato recommended revisiting the issue of employability. Adato testified Dr. Renick's psychosocial capacities evaluation was a more complete assessment of Claimant's understanding, memory, concentration, persistence,

social interaction and adaptation. Dr. Renick concluded Claimant exhibited a significant number of moderate to markedly limited restrictions; Adato opined this would make it more difficult for him to find work. (CX-63, pp. 40, 47-49). He added that for Claimant to receive his unemployment compensation, he would have had to establish that he engaged in an active job search; in Claimant's case this did not result in him finding employment. *Id.* at 56.

(8) Deposition of William J. Scheffler, IV

Scheffler testified by telephonic deposition on May 30, 2003; he was the claim supervisor for FARA who was briefly assigned to Claimant's file. Scheffler reviewed Claimant's file prior to the deposition and testified no indemnity was being paid. The last payment of benefits was on March 20, 2003, representing a four week period and totaling $2,821.93. Claimant was also paid for one day of indemnity in 2002, for a total of $94.06. Scheffler testified Employer paid Claimant a total of $18,060.67 in benefits from March 31, 2001 through October 21, 2001. All benefits were paid out based on an average weekly wage of $987.63; Scheffler was not involved in the computation of the average weekly wage. (JX-2, pp. 4, 9-10, 14-15, 20-22, 31). Sheffler stated Claimant's benefits were terminated in 2003 because Dr. Reed and Dr. Chokhawala both opined Claimant was not disabled from work; specifically, Dr. Reed stated on March 19, 2003, that his opinion regarding Claimant's MMI date and work restrictions had not changed. However, he did not speak with either of these doctors and has not received written reports since March 31, 2003. (JX-2, pp. 23-25). Scheffler acknowledged that Dr. Renick and Dr. Durfey were Claimant's authorized treating physicians and they did not authorize his return to work. Benefits were nonetheless terminated because Employer's IME did not agree; Scheffler testified Employer placed more weight on the IME than on Claimant's treating physicians. *Id.* at 26-28. Scheffler testified he was not aware of the restrictions placed on Claimant by Dr. Durfey, Dr. Reed or the IME. *Id.* at 34.

IV. DISCUSSION

A. Contentions of the Parties

Claimant contends Employer has not paid the indemnity benefits which are due and owing to him. Specifically, he argues he suffered a diminished wage-earning capacity when he returned to work in September, 2001, following his

injury and surgery. However, Employer failed to pay him partial disability benefits. Claimant further argues the FCE was inconsistent and inadequate, as it does not comply with the DOT and is not an accurate assessment of his physical abilities. Claimant contends that after Employer terminated Claimant secondary to his physical restrictions, Employer failed to provide total disability compensation benefits. Claimant contends he is incapable of returning to any work, pursuant to the opinions of his treating psychiatrist, therapist and pain management specialist, whose medical care were authorized by Employer/Carrier. He submits that the record supports a finding of permanent total disability, as Employer/Carrier have not established suitable alternative employment. In the alternative, if Claimant is found to be partially disabled, he contends he has a reduced wage earning capacity of $220 per week. Claimant does not put forth an argument of when he reached MMI.

Employer/Carrier contends Claimant's credibility was severely tarnished, as supported by Dr. Witkind and Dr. Reed's findings of possible symptom magnification. It argues Claimant's upper back and neck pains are not causally related to his lumbar disc herniation. Further, Employer/Carrier argues the FCE was accurate and they provided Claimant suitable alternative employment as carpenter foreman. It contends it placed Claimant in this position for his managerial and supervisor expertise, and that he did not perform up to his FCE levels. Additionally, it contends Claimant did not partake in a diligent job search, as he only contacted possible employers by telephone. Employer/Carrier contends the court should credit the opinions of Drs. Reed, Derbes, Witkind and Chokhawala. It argues Claimant should be released to work and earn income because his psychological problems stem from his financial worries. Finally, Employer/Carrier contends Claimant is a malingerer who intentionally sabotaged his position with Employer.

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000). Any credibility determination must be

rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In the present case, Employer contends Claimant's testimony is incredible, as he showed signs of symptom exaggeration, malingering, drug addiction, intentionally sabotaged his job with Employer and did not conduct a diligent job search. I do not find that the record supports these arguments. No physician has indicated Claimant was at any time addicted to narcotic medication. Although Dr. Reed and Dr. Derbes expressed concern at prescribing narcotic pain medication, neither doctor reported any signs of addiction. Moreover, Dr. Durfey, Dr. Renick and Dr. Finch all testified they did not notice any signs of addiction or drug abuse; Claimant's urinalysis was consistent with the medications he was prescribed. Dr. Durfey explained that because Employer/Carrier refused to authorize many of the treatments he recommended, he was obliged to prescribe Claimant more pain medications to control his pain levels. Additionally, Ms. Fuller corroborated this testimony, stating Claimant did not like to take medication but could not function without the Oxycontin. Thus, I find there is nothing in the record to support Employer/Carrier's assertion of Claimant's drug abuse.

Further, the record is not overwhelmingly clear that Claimant exhibited exaggeration or symptom magnification. Dr. Derbes, Dr. Durfey and Dr. Finch all testified Claimant was not a malingerer and did not magnify his symptoms. Dr. Witkind and Dr. Reed both found positive Waddell's signs indicating possible symptom magnification, but Dr. Reed testified Claimant's unsuccessful return to work indicates a psychological component of his symptoms. Dr. Chokhawala testified he noted some exaggeration and that Claimant "pretended to be upset". However, the observations of Drs. Witkind and Chokhawala are outweighed by the opinions of 4 treating doctors that Claimant was not a malingerer, but suffered significant psychological overlay of his symptoms.

Aside from Employer/Carrier's baseless assertions outlined above, I do not find any reason for which to discredit Claimant's testimony at hearing or in either of his depositions. I found Claimant to be well-spoken, intelligent and straight-forward. His work history, as corroborated by the record, indicated he was a dedicated hard-worker who rose through the ranks to become a foreman in the specialized field of carpentry. His testimony at his two depositions and at the hearing was consistent, and it was largely corroborated by the remainder of the

record. As such, I find there is no basis on which to render Claimant an incredible witness.

C. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Wright v. Connolly-Pacific Co*., 25 BRBS 161, 168 (1991). The Act presumes that a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary.[3] 33 U.S.C. § 920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 281 (1994).

(1) The Section 20(a) Presumption - Establishing a *Prima Facie* Case

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a)(2003). To establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this prima facie case is established, a presumption is created under Section 20(a) that the employee's injury arose out of employment. *Hunter*,

[3] This is not to say that the claimant does not have the burden of persuasion. To be entitled to the Section 20(a) presumption, the claimant still must show a *prima facie* case of causation. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

227 F.3d at 287. "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

It is well-settled that a psychological impairment can be an injury under the Act if it is work-related. *Lazarus v. Chevron, USA*, 958 F.2d 1297, 1299 (5th Cir. 1992); *Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127, 129 (1997); *Konno v. Young Brothers, Ltd.*, 28 BRBS 57, 61 (1994). Psychological impairments have included depression due to a work-related disability, *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, 15 (1998), anxiety conditions, *Moss v. Norfolk Shipbuilding & Dry Dock Corp.*, 10 BRBS 428 (1979), headaches, *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340, 341-42 (1989); and stress. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112, 117 (2000), *aff'd* 248 F.3d 54 (2nd Cir. 2001). Where a work-related accident has psychological repercussions it is also compensable. *Tampa Ship Repair & Dry Dock v. Director, OWCP*, 535 F.2d 936, 938 (5th Cir. 1976).

In its post-hearing memorandum, Employer/Carrier contests the compensability of Claimant's non-lumbar spine injuries as conditions unrelated to his work accident. Specifically, Employer/Carrier argue these symptoms did not arise until "well after" the accident, and no doctor related them to his work injury. It is uncontested that Claimant suffered a lumbar spine injury secondary to a work-place accident on March 30, 2001. On June 12, 2001, approximately two months after his lumbar spine diskectomy, Claimant began reporting continuing pain in his cervical spine and head. These complaints remained constant throughout the rest of his treatment with Dr. Reed and the rest of his treating physicians. In particular, Claimant complained of upper back and head aches and pains to Drs. Chokhawala, Finch and Renick, who all diagnosed him with chronic pain disorder secondary to his work accident and/or surgery. These doctors did not indicate that their diagnoses were not based at least in part on Claimant's cervical spine and head pains. Furthermore, each doctor that examined Claimant recognized some form of psychological overlay in his symptoms; previous courts have found headaches and stress to be compensable psychological impairments. As such, I find there is sufficient evidence to invoke the Section 20(a) presumption that Claimant's cervical spine and head pains are causally related to his work accident.

(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995)(failing to rebut presumption through medical evidence that claimant suffered an prior, unquantifiable hearing loss); *Hampton v. Bethlehem Steel Corp*., 24 BRBS 141, 144-45 (1990)(finding testimony of a discredited doctor insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986)(emphasis in original). *See also, Orto Contractors, Inc. v. Charpender*, 332 F.3d 283, 290 (5th Cir. 2003), *cert. denied* 124 S.Ct. 825 (Dec. 1, 2003)(stating that the requirement is less demanding than the preponderance of the evidence standard); *Conoco, Inc.*, 194 F.3d at 690 (stating the hurdle is far lower than a "ruling out" standard); *Stevens v. Todd Pacific Shipyards Corp*., 14 BRBS 626, 628 (1982), *aff'd mem*., 722 F.2d 747 (9th Cir. 1983)(stating the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption").

In the present case, both Dr. Witkind and Dr. Reed specifically testified that Claimant's cervical spine, shoulder, elbow, and head pains were not causally related to his workplace accident and subsequent lumbar spine injury. As such, Employer/Carrier successfully rebutted the Section 20(a) presumption.

(3) Causation on the Basis of the Record as a Whole

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co.*, 227 F.3d at 288; *Holmes*, 29 BRBS at 20. In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281.

Although two doctors, including Claimant's treating orthopedic surgeon, opined Claimant's upper back and head pains were not related to his accident or lumbar injury, this conclusion is outweighed by the totality of the evidence. As stated above, three doctors, including Employer/Carrier's psychiatric IME, diagnosed Claimant with chronic pain disorder secondary to his complaints of back pain, including cervical spine pain and headaches. The possibility that Claimant's upper back pains are related to his psychological chronic pain disorder is buttressed by the fact that his doctors diagnosed him with chronic pain disorder instead of a specific cervical spine or head injury, and Claimant's work restrictions were based on his lumbar injury and psychological conditions, not cervical spine injuries. This does not indicate that Claimant did not suffer pain in his upper body, but when combined with Claimant's consistent complaints of pain, it serves to establish that the pain was psychological in nature. Even Dr. Reed, who did not relate the injuries, testified Claimant likely had underlying psychological issues and that it was medically necessary to refer him to a psychiatrist. Therefore, I find the totality of the evidence weighs in Claimant's favor; as such, his upper back, shoulder, neck and head aches are causally related to his workplace injury, subsequent surgery and chronic pain issues.

D. Nature and Extent

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2003). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite

duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

In the present case, Dr. Reed placed Claimant at MMI for his back injuries on September 17, 2001. Although he continued to complain of back pains, Claimant's back condition has been more or less stabilized since that date. Dr. Reed indicated the goal of Claimant's back surgery was not to "cure" his back pain, but only to alleviate the pain radiating into his lower extremities. He indicated Claimant would need long-term pain management for his lumbar condition. Claimant suffered a worsening of his symptoms in early 2003, as indicated by an February 20, 2003 MRI showing disc space narrowing and mild stenosis of the spinal canal in Claimant's lumbar spine, and Dr. Reed placing Claimant on sedentary work restrictions. However, Dr. Reed released Claimant to medium duty work on March 19, 2003, and diagnosed him with lumbar degenerative disc disease without radiculopathy or instability; Dr. Reed recommended symptomatic treatment. This is consistent with Claimant's condition in September, 2001, and does not warrant a reassessment of his MMI date secondary to his physical conditions. Thus, I find Claimant reached MMI with respect to his lumbar spine injury on September 17, 2001.

However, none of Claimant's doctors have placed him at MMI for his psychiatric condition. Specifically, Dr. Durfey, Dr. Renick and Dr. Finch testified they have not placed Claimant at MMI. Dr. Derbes and Dr. Reed both deferred to

the opinions of Dr. Renick and Dr. Finch as to Claimant's psychiatric condition. Dr. Chokhawala, Employer/Carrier's IME, is the sole doctor who placed Claimant at MMI for his psychiatric condition sometime in May, 2003. However, I find his opinion is heavily outweighed by Claimant's five treating doctors' opinions to the contrary. Moreover, Dr. Chokhawala only examined Claimant on two occasions, April 22, 2003 and January 13, 2004; neither of these meetings was in May, 2003, when Claimant was supposedly at MMI. As such I find Claimant has not yet reached MMI with respect to his psychiatric condition, and his disability continues to be temporary in nature.

(1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

In the present case, no doctor has opined that Claimant is capable of returning to his usual job as construction foreman at Employer. The FCE, with all of its shortcomings, concluded that Claimant's abilities did not match the physical demands of his job and indicated he would need a modified position at Employer. Dr. Reed and Dr. Witkind testified Claimant may be capable of modified, medium duty work. Dr. Derbes released Claimant to light duty, part time work. Drs. Durfey, Renick and Finch have not released Claimant to any form of work, much less his prior job as construction foreman. As such, Claimant has established a *prima facie* case of total disability.

(2) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod.*

Co., 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999)(crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job). Light duty work in the Employer's facility does not necessarily preclude a finding of total disability, particularly where the claimant is found to be working under extraordinary effort or in a sheltered position. *See Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980)(sheltered employment is a job for which the employee is paid even if he cannot do the work and which is unnecessary); *Shoemaker v. Schiavone & Sons Inc.*, 11 BRBS 33, 37 (1979) (extraordinary effort); *Walker v. Pacific Architects & Engineers*, 1 BRBS 145, 147-48 (1974) (beneficent employer).

In the present case, Claimant reported difficulties in performing his modified duties as carpenter foreman. In fact, both Claimant and Jerry Albert testified the job was essentially the same he was performing at the time of his accident. Pursuant to the testimony of Claimant, McGruder, Albert and Adato, the carpenter foreman's job is approximately 40% administrative and 60% percent hands-on carpentry. Even if Claimant were capable of instructing someone else to perform the tasks outside of his physical restrictions, McGruder clarified that he preferred to have a hands-on foreman who could be effective in teaching the carpenters; the fact Claimant was incapable of performing the duties of carpenter foreman was supported by his transfer out of that job and into the shop after only one or two months. In the shop, Claimant did "nothing" 75% of the time, and spent the remainder on menial tasks such as cutting out small items, taking some inventory and performing some managerial duties. This was corroborated by Mrs. Fuller and Jerry Adato, who testified Claimant's duties in the carpenter's shop consisted of stenciling life jacket, building boxes and putting machinery together. Eventually, Claimant was terminated because of his work restrictions. Based on this evidence, I find Claimant's initial return to work as a carpenter foreman was not within his physical restrictions and required extraordinary effort; even so, he was transferred from that job in a short period of time. His work in the carpenter's shop was sheltered employment, as Claimant did nothing 75% of the time, performed menial tasks the remainder of the time, and nothing in the record supports a conclusion to the contrary. Therefore, I find Claimant is entitled to an award of total disability compensation benefits from September 10, 2001 through July 23, 2002.

An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540. 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). Where a physician finds a claimant physically capable of performing a job but psychologically unable to work, the judge may award total disability. *Quick v. Martin* 397 F.2d 644, 647 (D.C. Cir. 1968).

Following Claimant's termination because of his physical restrictions secondary to his work related accident and injury, Employer failed to submit any jobs which may be considered suitable alternative employment. Nonetheless, Claimant's physicians have not released him to work secondary to his psychiatric condition. Specifically, Drs. Durfey, Renick and Finch all placed Claimant on no-work status; Dr. Reed and Dr. Derbes deferred to these doctors with respect to Claimant's psychiatric condition. Dr. Chokhawala released Claimant to work within his FCE, but then testified Claimant suffered moderate to marked deficits in adaptation and social functioning, and was sensitive to criticism. Although he clarified that these limitations should not keep Claimant from being able to work, Adato testified they would affect Claimant's employability. I find, therefore, that the evidence weighs in favor of Claimant that he is unable to work in any capacity at this time. Therefore, Employer/Carrier are not capable of establishing suitable alternative employment and Claimant continues to be totally disabled.

In conclusion, I find Claimant has not reached MMI with respect to his psychiatric condition. Employer failed to place Claimant in a suitable job following his return to work; rather, Claimant was forced to exert extraordinary effort before being placed in a position which was sheltered and at the benevolence of Employer. Following his termination secondary to his work restrictions, Employer/Carrier did not establish suitable alternative employment. Even if they had found alternative jobs for Claimant, his physicians kept him on a no-work status secondary to his psychiatric condition and thus he was incapable of working. As such, I find the evidence supports a conclusion that Claimant continues to suffer temporary total disability as of the date of his initial injury, March 30, 2001.

E. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Attorneys' Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from March 30, 2001 to present and continuing based on a stipulated average weekly wage of $987.63.

2. Employer shall be entitled to a credit for all compensation previously paid to Claimant under the Act.

3. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE